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June 4, 2008

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 14, 2008

Case Number: TSO-0603

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for access authorization (also referred to as a security clearance). The governing regulations are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, I have concluded that the Individual's access should not be restored at this time.

I. Background

The Individual has worked at a DOE site since 2000. DOE Ex. 4 at 2. In 2001, the Individual signed a security acknowledgement, which stated that illegal drug use could result in the loss of his clearance. DOE Ex. 5. In 2002, the Individual was granted a clearance. DOE Ex. 7 at 3. In conjunction with a 2007 routine reinvestigation, the Individual completed an electronic Questionnaire for National Security Positions (the QNSP). DOE Ex. 4. In response to Question 24A, which asks about illegal drug use in the last seven years, the Individual reported three incidents of marijuana use in July 2003. *Id.* at 5. In response to Question 24B, which asks about illegal drug use while holding a clearance, the Individual answered "No." *Id.* In a subsequent Office of Personnel Management (OPM) background investigation, the Individual reported that he had engaged in computer security violations in 1993, when he was in college. DOE Ex. 6 at 1-2. After the OPM

investigation was completed, the Local Security Office (the LSO) interviewed the Individual. DOE Ex. 3 (Personnel Security Interview (PSI)).

In early 2008, the LSO notified the Individual that the information in its possession raised a substantial doubt about his eligibility for a security clearance. DOE Ex. 1 (Notification Letter, Att.). The Notification Letter cited the following: (i) the Individual's denial on the QNSP that he used illegal drugs while holding a clearance, see 10 C.F.R. § 708.8(f) (Criterion F, falsification); (ii) the Individual's admitted use of marijuana and related statements, see 10 C.F.R. § 708.8(k) (Criterion K, illegal drug use); and (iii) the Individual's breach of computer security and security clearance rules, see 10 C.F.R. § 708.8(l) (Criterion L, personal conduct).

The Individual requested a hearing. DOE Ex. 2. Upon this Office's receipt of the hearing request, I was appointed to serve as the Hearing Officer.

Prior to the hearing, the Individual submitted a copy of a federal statute on computer fraud, Ind. Ex. 1, and a copy of a 2004 Hearing Officer decision, Ind. Ex. 2. At the hearing, the Individual testified and presented the testimony of two other individuals - his girlfriend and a friend/colleague. He also submitted copies of performance appraisals, Ind. Ex. 3, and of credentials in the field of emergency care and rescue, Ind. Ex. 4. After the hearing, the Individual submitted documentation of professional achievement awards. Ind. Ex. 5.

## II. Applicable Regulations

The regulations governing an individual's eligibility for access authorization are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir.

1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a Hearing Officer. *Id.* § 710.21(b)(3). At a hearing, the burden is on the individual to present testimony or evidence to demonstrate eligibility for access authorization, i.e., that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

### III. Findings and Analysis

#### A. The Criterion F Concern

Question 24A of the QNSP asks whether an individual has used illegal drugs in the past seven years. The Individual answered "Yes" and stated that he used marijuana three times in July of 2003. Question 24B asks if the Individual has used illegal drugs while holding a clearance. The Individual answered "No." The Notification Letter cites the Individual's answer to Question 24B as the basis for the Criterion F concern.

It is undisputed that "deliberately" providing false information on a QNSP raises a security concern. It is also undisputed that the Individual's answer to Question 25B was incorrect. The issue is whether the Individual "deliberately" provided an incorrect answer.

As an initial matter, I note that the record does not contain the version of Question 24B viewed by the Individual when he completed the QNSP. The record contains a QNSP data print-out, which provides the following, shortened form of Question 24B: "Illegally used drugs as public safety official?" DOE Ex. 4 at 5. It is undisputed, however, that when the Individual completed the form electronically, he saw a longer question that specifically asks whether an individual has ever used illegal drugs while employed as a law enforcement officer, prosecutor or courtroom official, while possessing a security clearance or while in a position directly affecting the public trust. DOE Ex. 3 at 97.

During the hearing, the Individual testified that he answered "No" by mistake. Tr. at 5-6. The Individual speculated that, because the question listed a series of positions, he simply missed the reference to clearance holders. *Id.* In any event, the Individual testified, "common sense" indicates that he did not intend to deceive the DOE because "the only reason DOE or anyone else would be aware that the answer to [Question 24B] was wrong was my answer to [Question 24A]." *Id.*

I find that the Individual did not "deliberately" deny use of illegal drugs while holding a clearance. The Individual's testimony that he made a mistake is supported by his answer to Question 24A, in which he disclosed illegal drug use in 2003, a time during which he held a DOE clearance. DOE Ex. 4 at 5. Thus, as he testified, his answer to Question 24A discloses the information requested by Question 24B. This indicates that he did not intend to deceive DOE and that, in fact, DOE was not deceived. Accordingly, I find that the Individual has mitigated the Criterion F concern.

#### B. Criterion K Concern

As indicated above, the Individual used marijuana in 2003. During the PSI, the Individual expressed his views about marijuana use and acknowledged that he had friends who used marijuana. The Notification Letter cites the Individual's 2003 marijuana use and his PSI statements as the basis for the Criterion K concern. It is undisputed that illegal drug use raises a Criterion K concern. Tr. at 7.

In an effort to mitigate the concern, the Individual testified that his marijuana use was an isolated occurrence. The Individual testified that, as his QNSP indicates, his marijuana use occurred during a one-month period over four years ago. Tr. at 7. The Individual testified that he did not like the effect, has no other incidents of illegal drug use, and is committed to no future illegal drug use. *Id.* As to his views about marijuana use, the Individual testified that he recognizes that marijuana use is illegal and is inconsistent with DOE policy and the obligations of a clearance holder. *Id.* at 20-21, 60-61. As to marijuana use by friends, he testified that the use does not occur in his presence and that he believes the use is rare. *Id.* at 22, 63-64.

The record supports the Individual's testimony that his illegal drug use is limited and in the past. The Individual's girlfriend testified that she has known him since 2005 and lived

with him some of that time. *Id.* at 28. She does not use illegal drugs, has never seen the Individual use illegal drugs, and does not believe that the Individual uses illegal drugs. *Id.* at 28, 32-32. The Individual participates in physically challenging, recreational activities that are inconsistent with illegal drug use. *Id.* at 29, 32. The Individual's friend/colleague testified that he has known the Individual seven years and sees him "almost every day" at work. *Id.* at 37-38. They have adjacent offices and have worked together "on quite a few" projects over the years and won achievement awards. *Id.* at 38-39. They also see each other "quite a bit" socially, and the Individual has a key to the friend/colleague's house and takes care of a pet when the friend/colleague is away. *Id.* at 39. The friend/colleague has never seen any sign of illegal drug use. *Id.*

I find that the Individual has mitigated the concern that he will use illegal drugs in the future. I believe that the Individual testified honestly and candidly: throughout the security clearance process, the Individual discussed the matters at issue, freely providing derogatory information beyond the scope of the questions. The Individual's girlfriend and friend/colleague know the Individual well and have corroborated his testimony that he has no involvement with illegal drugs. Accordingly, given the totality of the circumstances in this case, I find that the Individual has resolved the Criterion K concern that he will use illegal drugs or be associated with illegal drug use. See generally *Personnel Security Hearing*, Case No. TSO-0396, 29 DOE ¶ 82,966 (2006) (drug use occurred six years ago and unlikely to recur).

I remain concerned, however, that the Individual's 2003 illegal drug use contributes to a Criterion L concern. I address this matter below.

#### C. Criterion L Concern

During the OPM interview and the PSI, the Individual reported that, in 1993, he and his college roommate committed computer security violations. DOE Ex. 6 at 1-2; DOE Ex. 3 at 38-64. The Individual reported that, although he had a smaller role than his roommate, their actions collectively resulted in (i) unauthorized access to student email accounts to test the results of a "password cracker," (ii) installation of a key logger program on four or five university computers, and (iii) release of two versions of a virus which, while intended to be harmless, resulted in the crash of some computers. The

Individual further reported the actions they took to disguise their activity. At the time of the actions, the Individual believed that the actions were illegal. DOE Ex. 3 at 58. Also during the OPM interview, and in the PSI, the Individual discussed his illegal drug use while holding a clearance. The Notification Letter cites the foregoing, and it is undisputed that this conduct raises a Criterion L concern.

The Individual has attempted to mitigate the concern. During the PSI, he attributed the 1993 computer security violations to "curiosity" and a youthful lack of responsibility, rather than any intent to cause harm. DOE Ex. 3 at 58-59. At the time of the PSI, he was not sure whether the actions were illegal. *Id.* He is more responsible now and would not consider doing anything comparable. *Id.* at 62-63. As for his illegal drug use while holding a clearance, he was motivated by "curiosity" and the use was in the past and occurred outside the workplace. *Id.* at 76. During the hearing, the Individual reiterated the foregoing, although he cited the legislative history of a federal statute for the proposition that the incidents were not illegal when committed. *Id.* at 7, 9-10, 20-22, 60-64, 70; see also Ind. Ex. 1 (federal statute on computer fraud). As evidence of his general trustworthiness, the Individual cited his performance at work, and he testified that he volunteers about 50 hours a month for a local emergency rescue organization, teaching and performing rescues. That testimony was corroborated by his witnesses, see, e.g., Tr. at 30-34 (girlfriend), 38-39 (friend/colleague), as well as copies of excellent performance appraisals, award certificates, and emergency rescue documentation. Ind. Ex. 3-5.

Despite the foregoing, I find that the Individual has not resolved the Criterion L concern. As an initial matter, the Individual has not established that the computer security activities were legal when they occurred. The Individual's reference to a federal statute ignores the possibility of other applicable federal and state laws. In any event, the asserted legality of the incidents does little to mitigate the concern that the Individual is not trustworthy. At the PSI, the Individual indicated that when he and his roommate engaged in the activities, they believed that the activities were illegal. DOE Ex. 3 at 58. At the hearing, the Individual acknowledged that the activities were "certainly unethical, and certainly a violation of the computer policy at the school." Tr. at 9. More importantly, the Individual's 1993 computer security violations cannot be characterized as isolated incidents attributable to youthful irresponsibility. Ten years later, in

2003, the Individual engaged in further irresponsible behavior when he breached security policy regarding illegal drug use. Accordingly, the ensuing passage of time (five years since the breach and one year since his disclosure of that breach) is insufficient to resolve the concern that the Individual's "curiosity" will result in further irresponsible behavior. Cf. *Personnel Security Hearing*, Case No. TSO-0103, 29 DOE ¶ 82,966 (2004) (concern resolved one year after disclosure of breach of security policy where breach was the only Criterion L concern).

#### V. Conclusion

The Notification Letter's Criteria F and K concerns have been resolved. The Notification Letter's Criterion L concern has not been resolved. Because the Criterion L concern is not resolved, I cannot conclude that granting access authorization to the Individual "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Based on the foregoing, the Individual's suspended access authorization should not be restored. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Janet N. Freimuth  
Hearing Officer  
Office of Hearings and Appeals

Date: June 4, 2008